86-117

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAJINDER SINGH SACHDEV,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1156—August Term, 1985

(Submitted April 17, 1986 Decided April 22, 1986)

Docket No. 85-4112

RAJINDER SINGH SACHDEV,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

KAUFMAN, TIMBERS and CARDAMONE,

Circuit Judges.

Sachdev petitions for review of a final deportation order of the Board of Immigration Appeals, holding

petitioner deportable because he was not in possession of a valid unexpired visa when he entered the United States.

Denied.

GUNNAR A. SIEVERT, New York, N.Y. (Leo E. Ypsilanti, P.C., *on the brief*), *for Petitioner.*

JORGE GUTTLEIN, Special Assistant United States Attorney (Rudolph W. Giuliani, United States Attorney for the Southern District of New York; Steven E. Obus, *on the brief*), *for Respondent.*

PER CURIAM:

Rajinder Singh Sachdev entered the United States on September 12, 1982. His father had filed a visa petition on Sachdev's behalf, and the Immigration and Naturalization Service ("INS") approved the petition on the ground that Sachdev was an unmarried son of a lawful permanent resident. Accordingly, Sachdev obtained a "second preference" visa status ("first preference" being reserved for unmarried children of American citizens), pursuant to section 204 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1154.

On July 4, 1982, one week after submitting his visa application to the American Vice Consul at the American Embassy in India, Sachdev married. Without informing

immigration officials of the change in his marital status, Sachdev entered the United States on September 12, 1982. On June 7, 1983, Sachdev filed a petition on behalf of his wife and newborn son, seeking their admission to the United States. The petition, which listed his date of marriage, alerted INS officials to the fact that Sachdev had married before he entered the United States. Accordingly, the INS commenced deportation proceedings against Sachdev on July 3, 1983, and an Immigration Judge found Sachdev deportable pursuant to 8 U.S.C. § 1251. The Board of Immigration Appeals affirmed the decision on March 7, 1985, and dismissed the appeal. Sachdev now petitions for review.

The substance of petitioner's claim is that the INS failed to abide by the notice requirements of 8 U.S.C. § 1155, which provides that the revocation of an approved visa petition has no effect "unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States."

Sachdev claims that because he did not receive notification in India concerning the revocation of his visa petition, the INS now is precluded by its own regulations from deporting him. We disagree. Here, petitioner married subsequent to the approval of his visa petition, which had been granted on the basis of his unmarried status. To forbid the INS from deporting such aliens, we believe, would invite fraud by petitioners seeking similar preference status.

Sachdev contested the propriety of his deportation at the hearing before the Immigration Judge. We agree with the finding of the Board of Immigration Appeals that this

proceeding provided Sachdev fair and adequate opportunity to rebut the Service's allegations that his visa was invalid. *See Matter of Alarcon*, 17 INS 574 (BIA 1980). We give great deference to the Board's reasonable interpretation of the notice requirements of section 205, particularly in view of the absence of contrary authority. *See INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1982); *De Los Santos* v. *INS*, 690 F.2d 56, 60 (2d Cir. 1982).

Sachdev also argues that the Service should be estopped from deporting him because officials failed adequately to warn him that if he married before entering the United States the approval of his visa petition would be revoked. For support, petitioner cites our holding in *Corniel-Rodriguez* v. *INS*, 532 F.2d 301 (2d Cir. 1976), in which we held the INS could not deport an alien where American officials had failed to warn her that marriage before entering the country would nullify her visa preference status.

Here, as in *Corniel-Rodriguez*, the INS was required by regulation to warn an alien, "when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission." 22 C.F.R. § 42.122(d) (modified in 1965). When he submitted his visa application, however, Sachdev signed a United States Department of State Optional Form 237 ("Statement of Marriageable Age Applicant"), which clearly set forth such a warning. Although petitioner complains the written warning should have been verbally translated for him into his native language, Punjabi, consular officials were justified in relying on Sachdev's own assertions on another form ("Optional Form 230") that he could read and write English. Accordingly, no translation was required. We believe this case presents a fundamentally

different situation from the one in *Corniel-Rodriguez*, where the petitioner received neither oral nor written warning of the consequences of her marriage. 532 F.2d at 307 n.19.[1]

Accordingly, the petition for review is denied.

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1 Because the facts here do not demonstrate misconduct by government officials, we need not reach the question of the applicability of the Supreme Court's holding in *Community Health Services* v. *Heckler*, 467 U.S. 51 (1984).

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS APPEAL ON BEHALF OF RESPONDENT:

Eric K. Copland, Esquire
P.O. Box 1249
488 Broadway
Albany, New York 12207

ON BEHALF OF SERVICE:

Michael Rocco
General Attorney

CHARGE:

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

APPLICATION: Termination

This matter is before the Board on appeal from the immigration judge's decision of November 23, 1983, finding the respondent deportable as charged but granting his application for the privilege of voluntary departure in lieu of deportation. The appeal will be dismissed.[1]

The respondent is a 29-year-old native and citizen of India who was admitted to the United States for permanent residence on September 12, 1982, classified as the unmarried son of a lawful permanent resident under section 203(a)(2) of the Immi-

1 We note that the respondent, through counsel, requested to appear for oral argument but then failed to respond to our letter of January 30, 1985, tentatively scheduling a date for oral argument.

gration and Nationality Act, 8 U.S.C. § 1153(a)(2). However, the record reflects and the respondent admitted at the hearing (Tr. at 1-2) that he was married some two months earlier on Juiy 4, 1982. Therefore, the respondent's second preference immigrant visa was invalid, he clearly was inadmissible as an unmarried son, and accordingly he is deportable as charged. *Matter of Alarcon*, 17 I&N Dec. 574 (BIA 1980). The only remaining issue is the respondent's claim that the Government should be estopped from deporting him because of alleged "affirmative misconduct" by the consular officer when he obtained his visa.

The record contains the respondent's original visa application which reflects it was subscribed and sworn to by the respondent before the American vice consul in New Delhi on June 25, 1982. That application indicates in Block 30 that the respondent does *not speak* English but *can read* and write English. The record also contains an Optional Form (OF) 237 (formerly FS-546), "Statement of Marriageable Age Applicant," signed by the respondent and dated June 25, 1982. This form warns the respondent in English that he will lose his immigrant status if he marries before applying for admission to the United States. *See* 22 C.F.R. § 42.122(d). At the hearing, the respondent acknowledged his signatures on both the visa application and the OF-237. Tr. at 3. The respondent's actual immigrant visa also is contained in the record and was issued on that same date, June 25, 1982, by the vice consul. The respondent now claims he does not speak or read English and that the consular officer did not follow required procedures in issuing his visa—principally, that the officer did not properly warn and explain to him that he should not marry before entering the United States. Therefore, the respondent asserts the government must be estopped from deporting him, consistent with *Corniel-Rodriguez* v. *INS*, 532, F.2d 301 (2d Cir. 1976).

We find *Corniel-Rodriguez* to be distinguishable and otherwise inapplicable to this case. First, the respondent has

failed to adequately prove that the consular officer erred in his conduct of the visa issuing process. There is a legal presumption that the consular official performed his duty correctly. *Matter of Reimer*, 12 I&N Dec. 443, 444 (BIA 1967); *see Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 405 (1971). It is clear that the *only* evidence to show breach of duty by the consular officer is the respondent's own testimony. Contrary to his assertion on appeal, this is patently insufficient to overcome the presumption of regularity, a principle illustrated by *Corniel-Rodriguez* itself. There, the alien's testimonial claim was corroborated by identical testimony of another witness as well as by the fact that the Government was unable to produce the "Statement of Marriageable Age Applicant" which the alien was supposed to have been given and signed. Here, however, there is absolutely no evidence to support the respondent's testimony. The respondent presented no corroborating testimony or affidavits from other witnesses to the visa issuing process, the OF-237 does exist and admittedly contains the respondent's signature, and the visa and visa application bear no indication of any irregularity on their faces. We are unaware of any case law holding that the presumption of regularity is overcome on the bare, unsupported testimony of the person claiming error and we are unwilling to so hold. Accordingly, we conclude the respondent has failed to overcome that presumption and prove his allegation that the consular officer breached his duty in issuing the respondent's immigrant visa.

Other factors also distinguish this case from *Corniel-Rodriguez*. Unlike that case, the instant respondent does not and cannot claim that he never received the required warning about the consequences of marriage upon his immigrant status because he did acknowledge by his signature receipt of the OF-237. Nevertheless, the respondent asserts this warning was not meaningfully conveyed to him—*i.e.*, in a language which he could understand—either in writing in the OF-237 or orally by the consular officer. It is true that the OF-237 recites on its face that "when necessary," the consular officer "shall trans-

late the English text [contained thereon] into the local language in the following space." However, under the circumstances, the consular officer did not err by not so translating the warning into the respondent's primary language (Punjabi) because there was no apparent necessity to do so. As indicated earlier, the consular officer was informed by the respondent's answers on his visa application that the respondent *did read* English. Moreover, that the respondent apparently did not converse with the consular officer in English was not unusual inasmuch as the visa application also indicated the respondent did *not speak* English. Thus, the consular officer would have had no reason to believe that the respondent could not understand the written warning on the OF-237. That he assertedly can not actually read English does not undercut the apparent reasonableness of the consular officer in not translating the OF-237 into Punjabi. Rather, it was the respondent who acted unreasonably. The asserted fact that a family friend completed the visa application for the respondent does not relieve the respondent of responsibility for the accuracy of its contents. In addition, reasonably prudent persons do not sign their names to documents without understanding what it is they are signing. The respondent signed both the visa application and the OF-237, apparently making no inquiry or request of the consular officer for further explanation of its contents nor giving any indication that this was necessary. Under all these circumstances, the respondent has failed to demonstrate that the consular officer's actions were in any way improper.

Assuming *arguendo* that the Board has authority to even invoke estoppel against the Government, the consular officer's conduct here does not support application of the estoppel doctrine. The Supreme Court has left unanswered the question whether, in some circumstances, the Government may be estopped by the "affirmative misconduct" of its employees. *See INS* v. *Miranda*, 459 U.S. 14 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). Whatever the resolution of that question, it is clear that no such "affirmative misconduct" exists under the circumstances of this case. For

example, in *Schweiker* v. *Hansen*, *supra*, a Government employee misadvised Hansen regarding certain eligibility requirements for social security benefits and breached his duty to encourage her to file a written application for benefits for which she was eligible; nevertheless, the Supreme Court concluded that such conduct fell "far short" of that which might require estoppel and did not amount to affirmative misconduct. We find that the action here of the consular officer also falls far short of that necessary to invoke estoppel and does not constitute "affirmative misconduct." We reach this same conclusion even if the consular officer's conduct in some regard might be faulted, as asserted by the respondent's unsubstantiated claim.[2]

In summary, we find that the respondent's deportability as charged is established by clear, unequivocal, and convincing evidence and we reject his estoppel defense.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ MARY MAGUIRE DUNN
Acting Chairman

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2 We otherwise note that this equitable relief should not be applied to accord the respondent a benefit for which he clearly was not eligible. As stated in *INS* v. *Miranda*, 459 U.S. 14, 16 (1982), it is "clear that neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country." *See also Akbarin* v. *INS*, 669 F.2d 839, 844 (1st Cir. 1982); *Kwon* v. *INS*, 646 F.2d 909 (5th Cir. 1981); *Montilla* v. *United States*, 457 F.2d 978, 986-87 (Ct. Cl. 1972); *Matter of Polanco*, 14 I&N Dec. 483 (BIA 1973).

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS MOTION ON BEHALF OF RESPONDENT:

Leo E. Ypsilanti, Esquire
291 Broadway, Suite 1200
New York, NY 10007

ON BEHALF OF SERVICE:

Michael Rocco
General Attorney

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under sec. 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

APPLICATION: Reconsideration; Termination

ORDER:

PER CURIAM: The respondent, through new counsel, moves for reconsideration on three gounds of our decision of March 7, 1985, finding him deportable as charged. First is the argument that the respondent's personal admission at the hearing that he was married in India prior to immigrating to this country constitutes a "conclusion of law" which the respondent was incompetent to make; this contention is so vapid as to deserve no discussion. The respondent's original counsel (a person clearly learned in the law) also admitted on the respondent's behalf allegation five in the Order to Show Cause, *i.e.*,

that the respondent married on July 4, 1982 in India (Tr. at 1). An alien's attorney's admissions at his deportation hearing constitute substantial evidence of the facts so admitted. *Rodriguez-Gonzalez* v. *INS*, 640 F.2d 1139 (9th Cir. 1981). Moreover, having failed to raise this issue on direct appeal, the respondent waived it and may not properly now seek reconsideration of an issue never brought before us for initial consideration. Second, the respondent's attempt to recloak his former estoppel argument in the new guise of a due process claim will not be countenanced and is rejected. Third, the claim that "there are some questions to be resolved about the [authenticity of the respondent's] signature on the [Form] OF-237" is ludicrous because the respondent himself verified the authenticity of his signature on that form. Transcript at 3. The respondent has presented nothing to overcome the bases of our previous comprehensive decision and this motion appears designed solely for purposes of delay. Accordingly, the motion to reconsider is wholly without merit and is denied.

/s/ MARY MAGUIRE DUNNE
Mary Maguire Dunne
Acting Chairman

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1 We also note that, contrary to the assertion on page 3 of the respondent's motion brief, several documents which indicate the respondent was married in India were introduced at the hearing, having been accepted into evidence *without objection* by the respondent. Tr. at 1, 5.

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

July 26, 1985

File: A37 277 276 - Buffalo

In re: RAJINDER SINGH SACHDEV

IN DEPORTATION PROCEEDINGS MOTION ON BEHALF OF RESPONDENT:

Leo E. Ypsilanti, Esquire
291 Broadway, Suite 1200
New York, NY 10007

APPLICATION: Stay of Deportation

Counsel for the respondent has applied for a stay of deportation pending the Board's consideration of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion to reopen, when received, will be granted. Therefore, the request for a stay of deportation is denied.

ORDER: The request for a stay of deportation is denied.

DAVID L. MILHOLLAN
Chairman

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 85-4112

SACHDEV

—v.—

INS

NOTICE OF MOTION—For Leave to refile out of date petition for rehearing timely filed on May 6, 1986

MOTION BY:

LEO E. YPSILANTI, P.C.
291 Broadway, New York, NY 10007
(212) 964-2055
LEO YPSILANTI, ESQ.

Has consent of opposing counsel:
A. been sought? x No
B. been obtained? x No

Has service been effected? x Yes

Is oral argument desired? x No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? x Yes
B. by firm date of argument notice? x Yes
C. If Yes, enter date: _____

OPPOSING COUNSEL:
U.S. ATTORNEY
Southern District of New York
One St. Andrews Plaza
Foley Square, NY 10007
JORGE GUTLEIN, ESQ.

EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL

Has request for relief been made below? x No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need
for this motion? x No

If No, explain why not:

Will the parties agree to maintain the
status quo until the motion is heard?

Judge or agency whose order is being appealed: N/A. This is a petition for rehearing of a decision which the Court rendered in a published opinion dated April 22, 1986.

Brief statement of the relief requested: Petitioner seeks to have his case re-heard *in banc* on the basis of an emended version of his original petition for rehearing which was filed on May 6, 1986, but which did not contain an *in banc* designation on the cover. If the untimeliness of the emended version is not waived, petitioner requests that rehearing be made on the basis of the petition in its original form as file on May 6, 1986.

By /s/ LEO E. YPSILANTI
Leo E. Ypsilanti
Attorney for Rajinder S. Sachdev

May 13, 1986

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

By /s/IRVING S. KAUFMAN

WHT/per IRK

RJC per IRK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed: MAY 16, 1986
ELAINE B. GOLDSMITH, *Clerk*